**THE HON'BLE SRI JUSTICE L. NARASIMHA REDDY*

AND

THE HON'BLE SRI JUSTICE M.S.K. JAISWAL

C.M.A.Nos.155 & 168 of 2002

COMMON JUDGMENT:

(Judgment of the Bench delivered by
the Hon'ble Sri Justice L. Narasimha Reddy)

% 07-02-2014

#Kande Andalu

..appellant

Vs.

$ Kanda Shankar

..Respondent

!Counsel for the appellant : Smt. S. Vani

^Counsel for the Respondent : Sri T. Suryakaran Reddy

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? Cases referred

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COMMON JUDGMENT: *(Per the Hon'ble Sri Justice L. Narasimha Reddy)*

Both the appeals are between the same parties. The appellant is the wife of the respondent. Their marriage took place way back on 20-12-1980 and they were also blessed with two daughters and one son, who are now not only married, but also settled in their respective lives.

The respondent i.e. the husband of the appellant, filed O.P.No.337 of 2000 in the Family Court, Hyderabad, under Section 13 of the Hindu Marriage Act (for short 'the Act') for divorce, against the appellant. The appellant, on the other hand, filed O.P.No.338 of 2000 against the respondent, under Section 9 of the Act, for restitution of conjugal rights. The respondent filed another O.P., being 356 of 2000 for custody of the minor children, born out of their wedlock. It is necessary to mention that the OPs were initially filed in different Courts, be it, at Mahabubnagar, or Secunderabad, and ultimately, all of them came to be transferred to the Family Court, Hyderabad, and re-numbered.

The plea of the respondent was that, ever since the marriage, the appellant has been harassing him on one pretext or the other, such as by insisting that he must reside in the house of her parents, and insulting him in various methods. He stated that when the appellant abruptly left the house at Mahabunagar, without information, he filed O.P.No.86 of 1987, and on receipt of notice, the appellant entered appearance and stated that she would live with the respondent, and thereupon, the O.P was withdrawn. It is also alleged that despite the promise made by the appellant,
to live together, she once again deserted and caused cruelty to him.

In the O.P.356 of 2000, filed for the custody of the children, the respondent stated that the appellant has taken both the children with her, and on account of lack of proper resources, the children are not being provided with standard education and proper care. He has also opposed the O.P.338 of 2000, filed by the appellant, for restitution of conjugal rights, stating that it was only a pretence, and that there are no *bona fides* on the part of the appellant.

The appellant opposed both the OPs, filed by the respondent. She pleaded that since the respondent did not have any independent source of income, he voluntarily joined the house of her parents and did some business, and when he insisted to shift the residence to Mahabubnagar, she did not object to it. She stated that the reason for her leaving Mahabubnagar in the year 1987 was that the respondent made the appellant and their children to live in a slum, whereas he was leading a luxurious life, and unable to bear the circumstances and surroundings, she had to move to the house of her parents. She denied the allegation of cruelty and desertion. The O.P filed for

custody of the children was opposed, stating that being the mother, she is the natural guardian of the children.

Through order dated 12-11-2001, the Family Court, Hyderabad allowed O.P.No.337 of 2000 and granted a decree of divorce. Consequently, O.P.No.338 of 2000 was dismissed. O.P.No.356 of 2000 was dismissed, obviously because the children became major, by the time the order came to be passed.

These two appeals are filed assailing the decrees passed in O.P.Nos.337 and 338 of 2000.

Smt. S. Vani, learned counsel for the appellant submits that it is the respondent, that has been harassing the appellant and the children for the past several decades, and out of sheer respect for the family system, the appellant has been bearing all the harassment. She contends that the allegation as to cruelty and desertion are totally baseless. Learned counsel submits that though O.P.No.86 of 1987 was filed by the respondent under Section 9 of the Act, he did not evince any interest in leading matrimonial life with the appellant, even after it was closed, by recording the settlement arrived at between the parties. She submits that there was no effort whatever on the part of the respondent to take the appellant and the children to Mahabubnagar, and not even a letter, leave alone notice, was issued in this behalf.

Sri T. Suryakaran Reddy, learned counsel for the respondent, on the other hand, submits that there was no union between the appellant and the respondent for the past several decades, and the appellant has deserted the respondent. He submits that the respondent was subjected to cruelty of different kinds, and he had to

lead a lonely and solitary life from 1987 onwards. Learned counsel further submits that whatever be the reasons for the parties to live separately, the fact remains that the marriage was irretrievably broken, and that the decrees passed by the trial Court accord with law.

In the two OPs, one filed by the respondent and the other by the appellant, for the reliefs of divorce and restitution of conjugal rights, respectively, the trial Court framed the following points for consideration:

1. Whether the petitioner/husband in O.P. 337/2000 is entitled to seek dissolution of their marriage on the grounds of cruelty or desertion or u/s 13(1a)(ii) of HM Act?
2. If not, whether the petitioner wife in O.P. 338/2000 is entitled to seek restitution of conjugal rights?

On behalf of the respondent, PWs 1 and 2 were examined and no documents were filed. The appellant deposed as RW-1 and she filed Exs.R-1 to R-4. The trial Court granted relief to the respondent.

The points that arise for consideration are;

a) whether the respondent proved the grounds of desertion and cruelty against the appellant; and
b) whether the appellant is entitled for the decree of restitution of conjugal rights.

Point (a):

For about seven years, after the marriage, the parties lived

together happily and three children were born out of their wedlock. The trouble started after the respondent shifted his residence to Mahabubnagar. Claiming the relief of restitution of conjugal rights, the respondent filed O.P.No.86 of 1987 in the Court of Senior Civil Judge, Mahabubnagar. The O.P., however, was withdrawn by the respondent, when the appellant filed a memo, expressing her willingness to join the respondent. According to the appellant, though the respondent took her and children to Mahabubnagar, they were required to stay in a slum area, and on repeated protest, the residence was shifted to a house, near Menaka Theatre, but the respondent did not take care of them. She stated that herself and children faced a situation of starvation and left with no alternative, they came back to Malkajgiri. Proceedings under Section 125 Cr.P.C have also ensued between the parties. It is only long thereafter, that the respondent filed the O.P. for divorce against the appellant, and another O.P. for custody of the children. He pleaded the grounds of desertion and cruelty.

In a way, on one and the same set of facts, the respondent rested both the grounds. His deposition as PW-1 is hardly of any help to him, since it is nothing, but repetition of the contents in the OP. PW-2 is a neighbour of respondent. The evidence of this witness is only to the effect that the appellant and the respondent lived hardly four months, together. This does not indicate the reasons, on account of which, the parties were living separately.

It is only when the appellant is proved to have left the company of the respondent, on her own accord, that she can be said to have deserted the respondent. The record discloses that
for a considerable time, the respondent was in the house of the brother

of the appellant, and there, he used to do business.

After few years, he has set up a family at Mahabubnagar. Complaining that the residence arranged by the respondent is not at all congenial, the appellant went back to the house of her parents. On filing of O.P.No.86 of 1987 by the respondent, under Section 9 of the Act, the appellant filed a memo, agreeing to join him. It is not as if she did not keep her word. Even the respondent does not say that. The case of the appellant is that after they came back, herself she and their children were made to reside in a slum, and left with no alternative, she had to shift the residence at Malkajgiri. Even if part of what is pleaded by the appellant is true, she cannot be said to be guilty of desertion. If the respondent was not able to provide proper residence to his wife and children,

he cannot accuse a wife, of deserting him. Added to that, the plea of the appellant that herself and the children were made to starve; remains unrebutted. Therefore, the mere fact that the appellant was living separately along with the children at Malkajgiri cannot be treated as an act of desertion.

Since the respondent did not prove any other specific acts of cruelty, but wanted the trial Court to treat the very act of living separately by the appellant as the one, amounting to cruelty,

the said ground also looses strength. The trial Court, however, proceeded on the basis that there was no justification for the appellant to live separately and through her acts and omissions, she caused cruelty to the respondent. We are not at all in agreement with the said finding. Hence, point (a) is answered accordingly.

Point (b):

Once we hold that the decree passed by the trial Court is untenable, the inescapable conclusion is that the appellant is entitled for the decree of restitution of conjugal rights.

Hence, the appeals are allowed, and the decree passed by the trial Court in O.P.No.337 of 2000 is set aside and the said OP is dismissed. OP No. 338 of 2000 filed by the appellant is allowed, as prayed for.

There shall be no order as to costs.

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L. NARASIMHA REDDY, J.

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M.S.K. JAISWAL, J.

Dt.07-02-2014

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